Ng Yong Long v Qua Hock Leong & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING PETITION NO D8–26–50 OF 2005
ABDUL WAHAB SAID AHMAD J
19 MAY 2006

Companies and Corporations — Receivership — Appointment of receivers and managers — Application — Whether there was good prima facie claim in the title of the plaintiff's — Whether property of company was in jeopardy and applicant would be in a worse situation if the appointment was delayed — Mere assertion of risk of dissipation of property insufficient — Rules of the High Court 1980 O 30 r 1(6)

The petitioner was the one of the original subscribers and promoters of the ninth respondent company ('the company'). The seventh respondent subsequently acquired the company with an initial majority interest followed by a total acquisition. As a result of this, the petitioner became a minority shareholder. The seventh respondent's management thereafter obtained control of the board of directors. In early May 2005, the company suspended the petitioner as director. Two of the suppliers and distributors of the company had commenced proceedings against the company. The petitioner filed this application for a receiver and manager to be appointed over the company including its property and that the receivers and managers report back to the court within 60 days from the date of its appointment the affairs of the company, in particular its financial status. The petitioner's grounds were: (1) the petitioner had been excluded from the management of the company for the year ending 31 December 2004; (2) a series of oppressive circular resolutions were passed by the Board of Directors of the company without notice or reference to the petitioner who was a director of the company at that time; (3) the stocks of the company were being removed from its warehouse which space was also part of the seventh respondent's warehouse; and (4) there was a likelihood of stocks being disposed off to cover the company's indebtedness with reference to corporate guarantees given by the seventh respondent without regard to the company's possible insolvency and consequences attaching thereon.

Held, dismissing the plaintiff's application:

(1) The principles in granting such an application for the appointment of receiver are as appeared in O 30 r 1(6) of the Rules of the High Court 1980: (a) that there is a good prima facie claim in the title of the plaintiffs; (b) that the property is in jeopardy; or (c) that the applicants will be in a worse situation if the appointment of a receiver is delayed (see para 35); *Matang Holdings Bhd & Ors v Dato' Lee San Choon & Ors* [1985] 2 MLJ 406 followed. A mere assertion that there was a risk of dissipation is not good enough. There has to be credible, solid evidence to substantiate the alleged risk. A member must

show that the company's assets are in jeopardy as a result of serious disputes between shareholders in the company (see para 36).

(2) The petitioner was a mere shareholder in the company and had no prima facie claim of the title of the assets of the company. The assets of the company belonged to the company and not to the petitioner or other shareholders of the company. The removal of the petitioner in this case was done in accordance with the memorandum and articles of association of the company (see para 38). Further, the audited accounts of the company were prepared by the eight respondent, an internationally acclaimed and reputed firm of auditors and approved by the company's board of directors on 4 April 2005. The petitioner had failed to adduce any evidence to support his allegations of improper accounting practices (see para 40).

(3) The petitioner had failed to establish that the assets or property of the company was in jeopardy or that the petitioner would be in a worse situation if the appointment of receiver was refused. A mere assertion that there was a risk of dissipation was not good enough. There had to be credible, solid evidence to substantiate the alleged risk (see para 48).

(4) As for the petitioner's allegation that stocks were being removed from the company's warehouse, there was no evidence that these stocks were being disposed off to cover the seventh respondent's indebtedness as a result of corporate guarantees provided by it. It was a mere assertion by the petitioner. There was no risk of dissipation of the stocks. The petitioner had failed to provide credible evidence to substantiate the alleged risk (see para 52).

[Bahasa Malaysia summary

Pempetisyen merupakan salah seorang daripada pelanggan dan penganjur syarikat responden kesembilan ('syarikat tersebut'). Responden ketujuh berikutan itu telah memperoleh syarikat tersebut melalui kepentingan majoriti pada mulanya diikuti dengan pemerolehan sepenuhnya. Akibat daripada ini, pempetisyen telah menjadi pemegang saham minoriti. Pengurusan responden ketujuh kemudiannya telah mengambil kuasa lembaga pengarah. Pada awal bulan 2005, syarikat tersebut telah menggantung pempetisyen sebagai pengarah. Dua daripada pembekal dan pengedar syarikat tersebut telah memulakan prosiding terhadap syarikat tersebut. Pempetisyen telah memfailkan permohonan ini agar penerima dan pengurus dilantik untuk syarikat tersebut termasuklah hartanya dan agar penerima dan pengurus melaporkan balik kepada mahkamah dalam tempoh 60 hari daripada tarikh pelantikannya berhubung urusan syarikat tersebut, khususnya kedudukan kewangannya. Alasan-alasan pempetisyen adalah: (1) pempetisyen telah dikecualikan daripada pengurusan syarikat tersebut untuk tahun berakhir 31 Disember 2004; (2) beberapa siri pekeliling resolusi yang menindas telah diluluskan oleh Lembaga Pengarah syarikat tersebut tanpa notis atau rujukan kepada pempetisyen yang merupakan pengarah syarikat tersebut pada masa itu; (3) stok syarikat tersebut telah dialihkan daripada gudangnya yang mana ruang itu juga merupakan sebahagian daripada gudang responden ketujuh; dan (4) terdapat kebarangkalian stok-stok tersebut dijual untuk melangsaikan keberhutangan syarikat tersebut dengan merujuk kepada

gerenti-gerenti korporat yang diberikan oleh responden ketujuh tanpa menghiraukan kemungkinan syarikat menjadi insolven dan akibat daripada itu. A

Diputuskan, menolak permohonan plaintif: B

(1) Prinsip-prinsip untuk membenarkan permohonan sedemikian bagi pelantikan penerima adalah seperti yang terdapat dalam A 30 k 1(6) Kaedah-Kaedah Mahkamah Tinggi 1980: (a) bahawa terdapat tuntutan prima facie yang baik berhubung hak milik plaintif-plaintif; (b) bahawa hartanah itu berada dalam bahaya; atau (c) bahawa pemohon-pemohon akan berada dalam situasi yang lebih teruk jika pelantikan penerima ditangguhkan (lihat perenggan 35); *Matang Holdings Bhd & Ors v Dato' Lee San Choon & Ors* [1985] 2 MLJ 406 diikut. Penegasan semata-mata bahawa terdapat risiko pelesapan tidak mencukupi. Perlu ada keterangan yang boleh dipercayai dan kukuh untuk membuktikan risiko yang dikatakan itu. Seorang ahli hendaklah menunjukkan bahawa aset-aset syarikat berada dalam bahaya akibat daripada pertikaian serius antara pemegang saham dalam syarikat tersebut (lihat perenggan 36). C D

(2) Pempetisyen hanyalah pemegang saham dalam syarikat tersebut dan tiada tuntutan prima facie hak milik aset-aset syarikat tersebut. Aset-aset syarikat tersebut dimiliki oleh syarikat tersebut dan bukan pempetisyen atau pemegang sahan lain syarikat tersebut. Pengalihan pempetisyen dalam kes ini telah dilakukan menurut memorandum dan artikel persatuan syarikat tersebut (lihat perenggan 38). Bahkan, akaun-akaun syarikat tersebut yang diauditkan telah disediakan oleh responden kelapan, firma juruaudit yang mempunyai reputasi dan bertaraf antarabangsa dan diluluskan oleh lembaga pengarah syarikat tersebut pada 4 April 2005. Pempetisyen telah gagal mengemukakan apa-apa keterangan untuk menyokong pengataannya berhubung amalan perakaunan yang tidak betul (lihat perenggan 40). E F

(3) Pempetisyen telah gagal untuk membuktikan bahawa aset-aset atau harta syarikat tersebut berada dalam bahaya atau bahawa pempetisyen akan berada dalam situasi yang lebih teruk jika pelantikan penerima ditolak. Penegasan semata-mata bahawa terdapat risiko pelesapan tidak mencukupi. Perlu ada keterangan yang boleh dipercayai dan kukuh untuk membuktikan risiko yang dikatakan itu (lihat perenggan 48). G

(4) Memandangkan pengataan pempetisyen bahawa stok-stok telah dialihkan daripada gudang syarikat tersebut, tiada keterangan bahawa stok-stok tersebut telah dijual untuk melangsaikan keberhutangan responden ketuju akibat gerenti-gerenti korporat yang diperuntukkan olehnya. Ia hanya merupakan penegasan semata-mata oleh pempetisyen. Tidak terdapat risiko pelesapan stok tersebut. Pempetisyen telah gagal untuk memberikan keterangan yang boleh dipercayai untuk membuktikan risiko yang dikatakan itu (lihat perenggan 52).] H I

Notes

For cases on appointment of receivers and managers, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 541–554.

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417 (refd)
Dato' Oon Ah Baa @ Boon Pak Leong & Ors v Eagle & Pagoda Brand Teck Aun Medical Factory Sdn Bhd & Ors (1) [2004] 2 MLJ 304 (refd)
Eng Bee Family v Banting Hock Hin Estate Hock Hin Estate Co Sdn Bhd & 8 Ors [2003] 6 AMR 245 (refd)
Federal Transport Service Co Ltd & Ors v Abdul Malik & Ors [1973] 1 MLJ 216 (refd)
Matang Holdings Bhd & Ors v Dato' Lee San Choon & Ors [1985] 2 MLJ 406 (folld)
Petitioner, Jenkins v Enterprise Gold Mines NL & Anor [1992] 6 ACSR 539 (refd)
Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661 (refd)

Legislation referred to

Companies Act 1965 s 181
Courts of Judicature Act 1964
Rules of the High Court 1980 O 1 r 4, O 30 r 1(6)
Specific Relief Act 1950 s 43

Tharminder Singh (Logan Sabapathy & Co) for the petitioner.
Jasbir Singh (Jasbeer Nur Hakimah & Rajpal) for the first to fifth respondents.
Atan Mustapha (Ainul Azman & Co) for the second, third, fourth, sixth and seventh respondents.

Abdul Wahab Said Ahmad J:

[1] The petitioner filed an application in encl 4 for a receiver and manager to be appointed over the ninth respondent company including its property and that the receivers and managers report back to the court within 60 days from the date of its appointment the affairs of the ninth respondent company, in particular its financial status.

[2] The ninth respondent ('the Company') is involved in computer supplies and accessories. The petitioner was one of its original subscribers and promoters. Sometime in July 2001, the first respondent (who is associated with the seventh respondent, a public listed company), approached the petitioner, which culminates in the first respondent participating in the business of the Company, with the first respondent becoming equal shareholders of the Company with joint control of the Board of the Company.

[3] The seventh respondent was then introduced as a purchaser intending to acquire the Company with an initial majority interest followed by a total acquisition. As a result of this the petitioner became a minority shareholder. The seventh respondent's management thereafter obtained control of the Board.

[4] Before the introduction of the seventh respondent, the Company has the ability to secure re-sellers of a substantial number of computer consumables and accessories and could obtain rebates from the suppliers and manufacturers and thereby meet

minimum quotas. It could secure further reimbursements from the suppliers and manufacturers for promotional and other campaigns carried out by the Company on the brand consumables and accessories.

[5] However, with the introduction of the seventh respondent, the first respondent had control over the financial affairs of the Company including structuring the deals with the suppliers and distributors. The petitioner was left to market the computer consumables and accessories to the extent permitted by the management of the seventh respondent and explore avenues to achieve the minimum quotas required of the suppliers and distributors.

[6] In early 2005, when preparing a preliminary audit of the Company for the year ending 31 December 2004, the second defendant realized that the Company was going to report a substantial loss. It was a result of a decline in the overall profitability of the Company and the first respondent not properly documenting his position on campaign reimbursements from certain suppliers with disputes then surfacing.

[7] The petitioner said that the second respondent, realizing that he would be asked what supervision he had exercised instigated the seventh respondent to question acts and deeds of the petitioner. The seventh respondent threatened to suspend the petitioner, the first respondent and fourth respondent. The apparent objective of the respondent, as alleged by the petitioner is to distance themselves away from the Company by proposing to hive off their shareholding interest in the Company back to the petitioner. In the interim, it hopes to manage the accounting difficulties in treatment of disputed amounts so as to minimize the extent of losses that ought to be reported.

[8] The petitioner was not averse to the idea of taking back the Company from the seventh respondent, on condition that the dues of the suppliers and distributors were met and the relationship with the suppliers and distributors were preserved. The second respondent seemed receptive to the idea but came up with a condition that seemed totally contrary to the ideas. The condition is that the petitioner must ensure that the future revenue of the Company would be increased through active commitment of re-sellers, particularly the principal re-seller, Omni Quest. The first respondent also imposed the condition that he must remain as shareholder so as to safeguard the interest of the seventh respondent. In anticipation of the proposed disposal, Omni Quest had come in to give a commitment to support the business of the Company in re-seller purchases of not less than RM90m for the year 2005.

[9] However, in early May 2005, the Company suspended the Petitioner as Director. The Petitioner was said to have been found guilty of breach of trust, acting in wilful disobedience and insubordination, engaging in business activities that competed with the Company. The seventh respondent then announced its accounts on 18 April 2005 that there was no loss sustained from the business of the Company.

[10] On 13 May 2005 the seventh respondent, through the sixth respondent announced instead that it had entered into a conditional agreement dated 13 May 2005 to sell its entire shares in the Company to only the first respondent.

Through the second respondent, the Company had followed up in May 2005 with demands on Omni Quest as though it was indebted to the Company in the sum of over RM12m.

[11] The petitioner questioned the suspension through a letter dated 18 May 2005. Through the said letter, the petitioner has also asked for a Board Meeting. This letter was not acceded to, The petitioner then followed up with a formal notice dated 31 May 2005 to call for a Board Meeting on 10 June 2005 to discuss, inter alia, the disposal of the shares to the first respondent, the so-called debt owing to Omni Quest and the true financial statements of the Company for the period ending 31 December 2004. On 10 June 2005, none of the Directors or Auditors of the Company turned up for the meeting. Instead new Company Secretaries who were appointed without reference to the petitioner attended. The Board Meeting was aborted for lack of quorum.

[12] Upon inspecting the Company Secretarial files, the petitioner stumbled upon Circular Board Resolutions inter alia, suspending the petitioner as Director of the Company, to convene an EGM on 30 June 2005 to remove the petitioner as a Director of the Company and an AGM on 15 June 2005 to adopt audited accounts of the Company. The Petitioner came for these meetings only to have his queries snubbed and to observe that the Meeting had gone ahead with the passing of the Resolutions.

[13] The petitioner subsequently found that a substantial amount of stock of the Company has been removed from the warehouse space of the Company and had received complaints from suppliers and distributors that they have not been paid substantial sums of money. Two of them have now commenced proceedings in the Kuala Lumpur High Court Suit No D5–22–150 of 2004 and D5–22–674 of 2004 and the seventh respondent is now trying to distance itself away from the Company, knowing that the Company is now technically insolvent and that its accounts does not reflect its true position. Further, the petitioner says that his legitimate queries and expectations have been totally disregarded through a process of oppressive resolutions calculated to further the collateral objectives of the seventh respondent. Hence, the petitioner said that unless the petitioner is granted the reliefs prayed for, the Company will continue to act oppressively against the petitioner.

[14] The petitioner's grounds for its application in encl 4 are that:

[15] Firstly, the petitioner applied for relief under s 181 of the Companies Act 1965 on the grounds that the petitioner had been excluded from the management of the ninth respondent and that there were serious problems with the audited accounts of the ninth respondent for the year ending 31 December 2004.

[16] Secondly, that a series of oppressive circular resolutions were passed by the Board of Directors of the ninth respondent without notice or reference to the petitioner who was a Director of the ninth respondent at that time.

[17] Thirdly, that the stocks of the ninth respondent's were being removed from its warehouse which space is also part of the seventh respondent's warehouse. A

[18] Fourthly, there is a likelihood of stocks being disposed off to cover the ninth respondent's indebtedness with reference to corporate guarantees given by the seventh respondent without regard to the ninth respondent's possible insolvency and consequences attaching thereon. B

[19] This application is made under O 30 of the Rules of the High Court 1980, read together with para 6 of the Schedule to the Courts of Judicature Act 1964. Although O 30 speaks of a receiver, the definition provision in O 1 r 4 includes a manager. Section 43 of the Specific Relief Act 1950 also refers to receivers. C

[20] To justify the appointment of a receiver and manager, the applicant must show a good title to the property and that the property is in jeopardy. He must also show that he would be in a worse position if the appointment id delayed. The petitioner referred to *Corporate Receivership — The Law and Practice* in Malaysia and Singapore by Suhendran Lim &. Chew. It was said that in applications involving shareholders it would be wrong to apply the above test. The appointment will be made by the courts at the instance of a shareholder where there is some legal or equitable right that ought to be protected and there is no remedy adequate for that purpose *(See Bond Brewing Holdings Ltd v National Australia Bank Ltd* [1990] 1 ACSR 445). D E

[21] The petitioner looked to a number of authorities to support his contention. The first is *Federal Transport Service Co Ltd & Ors v Abdul Malik & Ors* [1973] 1 MLJ 216, where it was said: '… If a state of things exist in which the governing body are so divided that they cannot act together, and there is the same kind of feeling between the members as there is frequently in the case of private partnership, it is clearly within the rule of this court to interfere and it will do so.: Therefore it was submitted that the only way to save the company and to ensure its continued operations would be to appoint a receiver as well as a manager.' F G

[22] In the second authority cited by the *Petitioner, Jenkins v Enterprise Gold Mines NL & Anor* [1992] 6 ACSR 539, it was said: 'It follows that oppression may be established where the controlling directors have pursued a course of action designed by them to advance their own interest or interests of others of their choice to the detriment of the company or to the detriment of the minority shareholders … ' H

[23] In the third authority, *Dato' Oon Ah Baa @ Boon Pak Leong & Ors v Eagle & Pagoda Brand Teck Aun Medical Factory Sdn Bhd & Ors (1)* [2004] 2 MLJ 304, it was held that the second to sixth respondents have not been shown to be practising transparency and accountability in respect of the affairs of the first respondent, especially in respect of monies and assets belonging to the first respondent. I

> … To my mind, a court appointed receiver and manager will be able to investigate and report as to how much monies have been received and whether they were utilized in good faith.

A **[24]** The petitioner submitted that there are concerns as to whether the Company has a functioning Board of Directors with Qua (first respondent) and the petitioner's purported removal on 30 June 2005. It was further said that the appointment of the receivers and managers will allow for an independent investigation and reporting back to this honourable court with the view of dispensing complete justice at the B hearing of the petitioner herein.

[25] The first, fifth and ninth respondents in their submissions mentioned the principles underlying an application for receivers and managers as stated in *Matang Holdings Bhd & Ors v Dato' Lee San Choon & Ors* [1985] 2 MLJ 406.

C

[26] Referring to the petitioner's first and second grounds of application, the first, fifth and ninth respondents stated that the removal of the petitioner was done in accordance with the Memorandum and Articles of Association of the ninth respondent.

D

[27] The first, fifth and ninth respondents submitted that the transfer of shares of the ninth respondent to the first and fifth respondent was done in accordance with reg 22 of the Memorandum and Articles of Association as modified by reg 2. The first, fifth and ninth respondents claimed that the petitioner is just unhappy that E being a promoter and founding member of the ninth respondent, he has ceased to be a director of the ninth respondent after the sixth respondent sold its majority shares to the first and fifth respondents.

[28] The first, fifth and ninth respondents submitted that the disposal of stocks is F without any factual basis. The fact that the suits are pending against the ninth respondent are not conclusive proof of the petitioner's allegations. The fact that the stocks are sold to a company where the fifth respondent was a director does not make the sale illegal.

G **[29]** The first, fifth and ninth respondents contended that the fact that the stocks were kept in the same compound as the seventh respondent does not mean that they were illegally disposed off or dissipated. The stocks had been kept in the same place since 2002. The petitioner was suspended as Managing Director of the ninth respondent on 9 May 2005 and removed as a Director on 30 June 2005.

H

[30] Lastly, it was submitted that the allegations pertaining to alleged irregularities or improper practices in the ninth respondent's accounts for the year ending 31 December 2004 would have occurred prior to the suspension of the petitioner on 9 May 2005. It is highly improbable that the alleged disposal of stocks has taken place only between May and July 2005 and not when the petitioner was managing the I affairs of the respondent from 14 October 1999 until May 2005.

[31] It was submitted that there were anomalies in the accounts of the Company. These were uncovered by the first Internal Audit Report, which led to further investigations that culminated in the second Audit Report. This was why the seventh

respondent terminated the employment of both the petitioner and Qua and sought to immediately distance itself away from their wrongdoings, through the sale of the Company. A

[32] It was further submitted that the Petitioner had control, was aware and had a direct interest in all the day to day activities of the Company, especially the Company's Balance Sheet. Clause 8.1.2 of the Share Resale Agreement laid down strict guidelines within which the petitioner and Qua were to act, left them in charge of the day to day running of the company. B

[33] As for the petitioner's allegation that stocks are being removed from the Company's warehouse, it was submitted that there is no evidence that these stocks are being disposed off to cover the seventh respondent's indebtedness as a result of corporate guarantees provided by it. C

[34] Having heard submissions on both sides, I dismissed the petitioner's application in encl 4 with costs. My reasons for so deciding are as follows. D

[35] The principles underlying an application for receivers and managers were stated in *Matang Holdings Bhd & Ors v Dato" Lee San Choon & 7 Ors* [1985] 2 MLJ 406: 'The principles in granting such an application for the appointment of receiver are as appeared in O 30 r 1(6) Rules of the High Court 1980 of the …: E

(a) that there is a good prima facie claim in the title of the plaintiffs;

(b) that the property is in jeopardy or

(c) that the applicants will be in a worse situation if the appointment of a receiver is delayed.' F

[36] A mere assertion that there was a risk of dissipation is not good enough. There has to be credible, solid evidence to substantiate the alleged risk. A member must show that the Company's assets are in jeopardy as a result of serious disputes between shareholders in the Company (see *Federal Transport Service Co Ltd & Ors v Abdul Malik & Ors* [1973] 1 MLJ 216). G

[37] The second, third, fourth, fifth, sixth and seventh respondents highlighted that the petitioner was given notice of the Company's meetings. The notices are sent by registered post. They are deemed to have been received seven days from the date of posting. seven days notice was given of the Board Meeting of 1 June 2005, where matters discussed were connected to the petitioner's conduct as an employee, ie as Managing Director of the Company. H

[38] The petitioner is a mere shareholder in the ninth respondent and has no prima facie claim of the title of the assets of the ninth respondent. The assets of theninth respondent belong to the ninth respondent and not to the petitioner or other shareholders of the ninth respondent. The removal of the petitioner was done in accordance with the Memorandum and Articles of Association of the ninth respondent. The relevant notices of the circular board resolutions and the AGM and I

EGM of the ninth respondent were given to the petitioner in accordance with reg 108 of the Memorandum and Articles of Association. The notice was sent by ordinary post to the petitioner's address as stated in Form 49 of the ninth respondent.

[39] The circular resolutions were passed in accordance with reg 7 of the Memorandum and Articles of Association. It only requires the signature of the majority of the directors to be effective.

[40] The audited accounts of the ninth respondent were prepared by Ernst & Young, the eighth respondent, an internationally acclaimed and reputed firm of auditors and approved by the ninth respondent's Board of Directors on 4 April 2005. The petitioner failed to adduce any evidence to support his allegations of improper accounting practices.

[41] The petitioner attended the 30 June 2005 EGM where he was removed as Director, in accordance with the ninth respondent's Memorandum and Articles of Association.

[42] The transfer of shares of the ninth respondent to the first and fifth respondent was done in accordance with reg 22 of the Memorandum and Articles of Association as modified by reg 2. Being a promoter and founding member of the ninth respondent, and having ceased to be a director of the ninth respondent after the sixth respondent sold its majority shares to the first and fifth respondents it is understandable that the petitioner is unhappy.

[43] I refer to Dato' Low Mong Hua (In his personal capacity and as representative of the members of the *Eng Bee Family v Banting Hock Hin Estate Hock Hin Estate Co Sdn Bhd & 8 Ors* [2003] 6 AMR 245 where in an application under s 181 of the Companies Act 1965, it was held that as minority shareholders, the petitioner must accept majority rule and that any dissatisfaction with the wishes of the majority is not oppression. It was also held that even if the petitioner had in the past held on to the management and control within the group it does not mean that the management control was entrenched, or as of right, or could not be changed in any way whatsoever. The court further held that the Memorandum and Articles of Association of all the companies clearly vested management control in the Board of Directors, not any one person or group.

[44] The Court of Appeal in *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661 held that relief under s 181 of the Companies Act 1965 is only available when those in control of the conduct of the affairs of the Company have acted oppressively towards the minority. However, it is not illegal for two or more shareholders to unite upon a course of corporate action, or upon officers they choose to elect or remove, provided in doing so, they do not contravene any express statute or contract, or contemplate any illegal object, fraud or oppression against the other shareholders of the company. I also refer to Gopal Sri Ram JCA's decision in the case of *Abdul Rahim bin Aki v Krubong Industrial Park*

(Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417, where his Lordship said that a petitioner who brings an action under this doctrine must show that those wielding majority control abused powers vested in them.

[45] Though this issue is related to the legitimate expectation of the petitioner to manage and control ninth respondent a matter for the substantive petition, it is relevant here for this application to show or negate any impropriety, irregularities or oppressive acts to warrant or otherwise the appointment of a receiver and manager for the ninth respondent.

[46] The allegations pertaining to alleged irregularities or improper practices in the ninth respondent's accounts for the year ending 31 December 2004 would have occurred prior to the suspension of the petitioner on 9 May 2005. It is highly improbable that the alleged disposal of stocks has taken place only between May and July 2005 and not when the petitioner was managing the affairs of the respondent from 14 October 1999 until May 2005.

[47] Where a member resorts to the appointment of receivers and managers, it must be shown that the Company's assets are in jeopardy as a result of serious disputes between shareholders in the Company (see *Federal Transport Service Co Ltd & Ors v Abdul Malik & Ors* [1973] 1 MLJ 216).

[48] Applying the principles in *Matang Holdings Sdn Bhd*, I am satisfied the petitioner had failed to establish that the assets or property of the ninth respondent is in jeopardy or that the petitioner would be in a worse situation if the appointment of receiver is refused. A mere assertion that there was a risk of dissipation is not good enough. There has to be credible, solid evidence to substantiate the alleged risk.

[49] The petitioner was given notice of the Company's meetings. The notices are sent by registered post. They are deemed to have been received seven days from the date of posting. Seven days notice was given of the Board Meeting of 1 June 2005, where matters discussed were connected to the petitioner's conduct as an employee, ie as Managing Director of the Company.

[50] There were anomalies in the accounts of the Company. These were uncovered by the first Internal Audit Report, which led to further investigations that culminated in the second Audit Report. This was why the seventh respondent terminated the employment of both the petitioner and Qua and sought to immediately distance itself away from their wrongdoings, through the sale of the Company.

[51] The seventh respondent made public its consolidated accounts in April 2005. Its audited accounts were separately finalized and audited by Ernst & Young and the eighth respondent. Only after that did the seventh respondent offer the Company for sale to both the petitioner and Qua. The petitioner did not challenge the consolidated audited account of the respondent at that time and agreed to repurchase the Company, by executing the uncompleted Share Resale Agreement. The petitioner failed to provide the stipulated deposit resulting in the Company being sold only to

Qua. The petitioner had control, was aware and had a direct interest in all the day to day activities of the Company then, especially the Company's balance sheet. Clause 8.1.2 of the Share Resale Agreement laid down strict guidelines within which the petitioner and Qua were to act and left them in charge of the day to day running of the Company.

[52] As for the petitioner's allegation that stocks are being removed from the Company's warehouse, there is no evidence that these stocks are being disposed off to cover the seventh respondent's indebtedness as a result of corporate guarantees provided by it. Its a mere assertion by the petitioner. There is no risk of dissipation of the stocks. The petitioner had failed to provide credible evidence to substantiate the alleged risk.

[53] Hence, I am satisfied that this is not a proper case to grant the appointment of a receiver and manager and thereby dismissed the application with costs.

Application dismissed.

Reported by Loo Lai Mee